



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
FREEDOM OF INFORMATION ACT BRANCH
Washington, D.C. 20570

Via email

September 10, 2021

Re: FOIA Request NLRB-2021-001281

Dear Ms. Jacqueline Stevens (The Intercept):

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received on August 23, 2021, in which you requested the case file in *Northwestern University*, Case No. 13-CA-206176. You assumed fees up to \$37.00 to process your request, but also requested a fee waiver.

We acknowledged your request on August 23, 2021.

Our search of the Agency's electronic casehandling system, NxGen, has been conducted. This search yielded 154 pages of responsive, releasable pages from the requested case file, which are attached.

After a review, I have determined that portions of the attached records are exempt from disclosure under Exemptions 6, 7(C), and 7(D) of the FOIA, (5 U.S.C. § 552 (b)(6), (b)(7)(C), and (b)(7)(D)). These records are being provided to you either in their entirety or partially redacted to the extent they were found to be reasonably segregable from the exempt portions of the responsive records. Specifically, redactions have been made pursuant to FOIA Exemption 6, which pertains to information the release of which would constitute a clearly unwarranted invasion of personal privacy, FOIA Exemption 7(C), which pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy, and FOIA Exemption 7(D), which permits an agency to withhold records or information compiled for law enforcement purposes that could reasonably be expected to disclose the identity of a confidential source.

Fourteen pages of case file records are being withheld pursuant to Exemption 5, 5 U.S.C. § 552(b)(5), including the Board agent's casehandling log and internal emails and investigative memoranda between Region 13 staff containing guidance and recommendations regarding the processing of this case.

Exemption 5 allows agencies to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other

than an agency in litigation with the agency,” and covers records that would “normally be privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997). The deliberative process and the attorney work-product privileges are two of the primary privileges incorporated into Exemption 5.

The deliberative process privilege protects the internal decision-making processes of government agencies to safeguard the quality of agency decisions. *Competitive Enter. Inst. v. OSTP*, 161 F. Supp.3d 120, 128 (D.D.C. 2016). The basis for this privilege is to protect and encourage the creative debate and candid discussion of alternatives. *Jordan v. U.S. Dep’t. of Justice*, 591 F.2d 753, 772 (D.C. Cir.1978). Two fundamental requirements must be satisfied before an agency may properly withhold a record pursuant to the deliberative process privilege. First, the record must be predecisional, *i.e.*, prepared in order to assist an agency decision-maker in arriving at the decision. *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). Second, the record must be deliberative, *i.e.*, “it must form a part of the agency’s deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Judicial Watch, Inc. v. FDA*, 449 F.3d at 151 (quoting *Coastal States Gas Corp. v. U.S. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). To satisfy these requirements, the agency need not “identify a specific decision in connection with which a memorandum is prepared. Agencies are . . . engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.” *Sears, Roebuck & Co.*, 421 U.S. at 151 n.18 (1975). Moreover, the protected status of a predecisional record is not altered by the subsequent issuance of a decision, *see, e.g., Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979); *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005) or by the agency opting not to make a decision. *See Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995), *aff’d*, 76 F.3d 1232 (D.C. Cir. 1996).

The attorney work-product privilege protects records and other memoranda that reveal an attorney’s mental impressions and legal theories that were prepared by an attorney, or a non-attorney supervised by an attorney, in contemplation of litigation. *See United States v. Nobles*, 422 U.S. 225, 239 n.13 (1975); *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947). Additionally, the protection provided by Exemption 5 for attorney work-product records is not subject to defeat even if a requester could show a substantial need for the information and undue hardship in obtaining it from another source. *See FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983). Further, protection against the disclosure of work product records extends even after litigation is terminated. *Id.* The attorney work-product privilege extends to records prepared in anticipation of both pending litigation and foreseeable litigation and even when no specific claim is contemplated at the

time the attorney prepared the material. *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992). Furthermore, the privilege protects any part of a record prepared in anticipation of litigation, not just the portions concerning opinions and legal theories, see *Judicial Watch v. U.S. Dep't of Justice*, 432 F.3d 366, 371 (D.C. Cir. 2005), and is intended to protect an attorney's opinions, thoughts, impressions, interpretations, analyses and strategies. *Id.*; see also *Wolfson v. United States*, 672 F. Supp.2d 20, 29 (D.D.C. 2009). See *Judicial Watch*, 432 F.3d at 371 (finding that an agency need not segregate and disclose non-exempt material if a record is fully protected as work product).

Here, the withheld records meet the requirements for Exemption 5 protection under both the deliberative process and attorney work-product privileges. They are internal and predecisional. They reflect the views of Regional staff concerning prosecutorial policies and strategies in the processing of this unfair labor practice case. Since they analyze various legal theories and strategies, these internal casehandling records reflect the deliberative and consultative process of the Agency that Exemption 5 protects from forced disclosure. *Sears, Roebuck and Co.*, 421 U.S. at 150-52. Additionally, the content of the records is also attorney work-product, as it reflects legal analysis and opinions of Regional staff created to assist superiors in their decision-making process, in anticipation of possible litigation. Accordingly, these records are withheld in their entirety.

Other pages of investigatory records are being withheld under FOIA Exemptions 6, 7(C) and 7(D), since disclosure could constitute an unwarranted invasion of privacy and/or reveal a confidential source.

Exemption 6 permits agencies to withhold information about individuals in "personnel and medical and similar files" where the disclosure of the information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667, 673 (D.C. Cir. 2016). The "files" requirement covers all information that "applies to a particular individual." *Ayuda, Inc. v. FTC*, 70 F.Supp.3d 247,264 (D.D.C. 2014) (citing *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 601-02 (1982)). "'Similar files' has been interpreted broadly to include '[g]overnment records on an individual which can be identified as applying to that individual.'" *Pavement Coatings Technology Council v. United States Geological Survey*, 2019 WL 7037527, *8 (D.D.C. Dec. 19, 2019) (quoting *Wash. Post Co.*, 456 at 602). See *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 198-199 (D.C. Cir. 2006) (Exemption 6 may exempt not just files, but personal information such as names and addresses). Exemption 7(C) permits agencies to withhold information compiled for law enforcement purposes where disclosure of the information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C); *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989), see also *Brennan Center for Justice at New York University School of Law v. DOJ*, 2020

WL 1189091, *3-4, (D.D.C. Mar. 12, 2020) (reaffirming that Exemption 7(C) imposes a “lower bar for withholding” than Exemption 6,).

Application of Exemptions 6 and 7(C) requires a two-part balancing test that considers: (1) whether there is a legitimate personal privacy interest in the requested information, and, if so; (2) whether there is a countervailing public interest in disclosure that outweighs the privacy interest. *Judicial Watch, Inc. v. Nat'l Archives & Records Admin.*, 214 F. Supp. 3d 43, 58 (D.D.C. 2016), *aff'd*, 876 F.3d 346 (D.C. Cir. 2017), citing *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004). With respect to the first factor, the Supreme Court has described Exemptions 6 and 7(C) as reflecting privacy interests in “avoiding disclosure of personal matters,” *Reporters Comm.*, 489 U.S. at 762, maintaining the “individual’s control of information concerning his or her person,” *id.* at 763, avoiding “disclosure of records containing personal details about private citizens,” *id.* at 766, and “keeping personal facts away from the public eye,” *id.* at 769. Consistent with these concerns, privacy interests have been recognized for individuals named in a law enforcement investigation, including third parties mentioned in investigatory files, as well as witnesses and informants who provide information during the course of an investigation. See *Rugiero v. U.S. Dep’t of Justice*, 257 F.3d 534, 552 (6th Cir. 2001); *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995); and *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 985 (9th Cir. 1985).

The withheld pages are exempt from disclosure under the above balancing test. They are investigative records obtained by the Agency for the purpose of enforcing the National Labor Relations Act, and contain individuals’ names, addresses, and other identifying information that fit squarely within the types of privacy interests that Exemptions 6 and 7(C) were intended to protect from disclosure. By contrast, I perceive no countervailing public interest in disclosure. The public’s interest in disclosure depends on “the extent to which disclosure would serve the ‘core purpose of the FOIA,’ which is ‘contribut[ing] significantly to public understanding of the operations or activities of the government.’” *U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (emphasis in original), *quoting Reporters Comm.*, 489 U.S. at 775. As the Supreme Court further explained in *Nat'l Archives & Records Admin.*, 541 U.S. at 172, to defeat a privacy interest there must be some indication that the “public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake . . . [and that] the information is likely to advance that interest.” No such public interest is evident here that outweighs the private interests identified above. For the foregoing reasons, these pages are protected from disclosure under Exemptions 6 and 7(C).

In addition to Exemptions 6 and 7(C), Exemption 7(D) also applies. Exemption 7(D) permits an agency to withhold records or information compiled for law enforcement purposes that “could reasonably be expected to disclose the identity

of a confidential source . . .” 5 U.S.C. § 552(b)(7)(D). A “source” is considered confidential if he or she “provided information under an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred.” See *U.S. Dep’t of Justice v. Landano*, 508 U.S. 165, 172 (1993). Exemption 7(D) permits withholding any information furnished by a source that might disclose or point to his or her identity. See *Radowich v. U.S. Attorney, Dist. of Md.*, 658 F.2d 957, 960 n.10 (4th Cir. 1981).

One of the purposes underlying Exemption 7(D) is to “encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants’ identities confidential.” *United Technologies Corp. v. NLRB*, 777 F.2d 90, 94 (2d Cir. 1985). This is “particularly important to agencies, such as the NLRB, . . . [which] must depend on the information provided by the charging party and its witnesses” who are often the “sole source of the Board’s information in unfair labor practice cases.” *Id.* (“An employee-informant’s fear of employer retaliation can give rise to a justified expectation of confidentiality.”). Significantly, a source’s identity can be withheld under Exemption 7(D) even if his or her identity is or becomes known through other means. See, e.g., *Jones v. FBI*, 41 F.3d 238, 248-49 (6th Cir. 1994); *Ferguson v. F.B.I.*, 957 F.2d 1059, 1068-69 (2d Cir.1992) (Exemption 7(D) protection is available even if the source has testified at a hearing or the information provided by the source has otherwise been made public); *Lesar v. U.S. Dep’t of Justice*, 636 F.2d 472, 491-92 (D.C. Cir. 1980); *Ortiz v. Dep’t of Health and Human Serv.*, 70 F.3d 729, 733 (2d Cir. 1995); *United Technologies*, 777 F.2d at 95. Moreover, Exemption 7(D) protection is not diminished by the fact that a charging party may ultimately withdraw his or her claim, or if the investigation or case has otherwise been closed. *Ortiz*, 70 F.3d at 733.

For the purpose of assessing fees, we have placed you in Category C, as a representative of the news media, in that you qualify as a person “actively gathering news for an entity that is organized and operated to publish or broadcast news to the public.” NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(vii). Accordingly, there is no charge assessed for this request, and your request for a fee waiver is denied as moot.

You may contact Ed Hughes, the FOIA Attorney who processed your request, at (202) 273-1773 or by email at ed.hughes@nlrb.gov, as well as the Agency’s FOIA Public Liaison, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Attorney, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency’s FOIA Public Liaison is:

FOIA Public Liaison
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: FOIAPublicLiaison@nrlb.gov
Telephone: (202) 273-0902
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
Email: ogis@nara.gov
Telephone: (202) 741-5770
Toll free: (877) 684-6448
Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at:
<https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt
Chief FOIA Officer
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: DLCFOIAAppeal@nrlb.gov

Any appeal must be postmarked or electronically submitted within 90 days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the FOIA Attorney, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

/s/ Synta E. Keeling

Synta E. Keeling
Freedom of Information Officer

Attachment: (154 pages)